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No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

SUPPLEMENTAL BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of *certiorari* remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Ford Motor Company ("Ford") respectfully submits this supplemental brief to address the implications of this Court's decision in *Philip Morris USA* v. *Williams*, No. 05-1256 (Feb. 20, 2007), handed down after Ford filed its Petition. *See* Rule 15.8. *Philip Morris* makes even clearer the need for this Court's plenary review of the first two questions presented in Ford's Petition, and confirms that, at a minimum, this Court should grant *certiorari*, vacate the judgment, and remand the case to the California courts for reconsideration in light of this new ruling. Indeed, this case presents an even more graphic example of improper punishment for alleged third party harm than *Philip Morris*.

DISCUSSION

I. *Philip Morris* Reinforces The Need To Clarify Application Of The Due Process "Fair Notice" Principle To The Standards Governing Punitive Damage Liability

The Petition's first question presented focuses on the lack of adequate procedures and standards governing the imposition of liability for (as opposed to the amount of) punitive damages in product liability cases. Pet. at 9-22. *Philip Morris*, which focused on "the Constitution's procedural limitations," slip op. at 5, bears directly on this question.

In vacating the punitive damage award in *Philip Morris*, the Court observed, among other things, that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose,'" and "it may threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's caprice." *Id.* at 4 (internal quotation marks omitted). Moreover, the Court recognized that such a standardless regime "may impose one State's (or one

jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies." *Id.* at 5 (citation omitted). Accordingly, the Court made clear that, "given the risks of arbitrariness," the "concern for adequate notice," and other dangers posed by punitive damages, "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." *Id.* at 7.

While *Philip Morris* addressed the standards for determining the *amount* of punishment, the concerns the Court underscores—such as fair notice, arbitrary punishments, and conflicting standards—apply with stronger force to the imposition of *liability* for punitive damages. Due process requires that a person be afforded "fair notice . . . of the *conduct* that will subject him to punishment." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996) (emphasis added). Here, California has failed to establish standards that provide such notice, instead permitting juries and reviewing courts to ignore all objective referents by which a defendant manufacturer in a product liability case can meaningfully gauge its conduct in advance. *See* Pet. at 9-22. As applied to complex product liability cases such as those involving automotive vehicles, California law "add[s] a near-standardless dimension to the punitive damages equation," *Philip Morris,* slip op. at 6, virtually guaranteeing that "[t]he jury will be left to speculate," "threaten[ing] arbitrary punishments," *id.* at 4, and defeating the policy choices of other States and the federal government. *Id.* at 7; *see* Pet. at 13-14.

In short, *Philip Morris* focused on precisely the "fundamental due process concerns . . .—risks of arbitrariness, uncertainty and lack of notice," *id.* at 6—that are at issue in here in a different context that raises even more serious due process difficulties. This Court has never directly addressed the due process constraints on the imposition of punitive damage liability in the first instance. Explication of the fundamental principle that juries cannot be cut loose from objec-

tive moorings when deciding whether to punish any more than when deciding the amount of punishment would greatly advance the jurisprudence that is applied to thousands of civil trials every year. Enforcing this basic procedural due process principle would reduce the number of arbitrary verdicts requiring excessiveness review. The Court should therefore grant plenary review and address this issue in this case.

II. *Philip Morris* Leaves Open The Important And Recurring Excessiveness Issues That Are Especially Acute In Personal Injury Cases

Ford's second question presented is plainly certworthy, as it raises a variant of the excessiveness question upon which the Court granted review—but did not reach—in *Philip Morris*. Prior to *Philip Morris*, all of the Court's punitive damage cases arose in the context of financial torts. Product liability and personal injury cases, however, present unique and troubling issues regarding application of the due process excessiveness guideposts that have divided the lower courts. *See* Pet. at 22-28. In view of its disposition of the first issue presented in *Philip Morris*, the Court declined to reach the issue "whether the [punitive damage] award is constitutionally 'grossly excessive.'" Slip op. at 10. Consequently, the lower courts still lack guidance regarding the due process guideposts' meaning in personal injury cases.

This case provides an even better opportunity than *Philip Morris* for the Court to provide such guidance. The precise excessiveness issue framed by *Philip Morris* concerned application of the ratio due process guidepost, *Philip Morris*, slip op. at 4, but *Philip Morris* was a high ratio case like all the Court's previous punitive damage decisions. Here, in contrast, the ratio is 2-to-1, but the compensatory award—$122.6 million as awarded by the jury and $27.6 million after the California courts' remittiturs, Pet. App. 2a-3a, 61a—is far more substantial than in *Philip Morris* or any other prior case considered by the Court, and consists mostly of non-

economic damages that themselves likely contain a punitive component. Moreover, this Petition raises the issue of how the reprehensibility guidepost applies in personal injury cases, and thus would allow the Court to address in one case the interaction of the due process guideposts in the physical injury context. Thus, *Philip Morris* confirms that the second question presented warrants plenary review.

III. At A Minimum, The Court Should Grant, Vacate, And Remand This Case

The Court in *Philip Morris* squarely held that due process does not "permit[] a jury to base [a punitive damage] award *in part* upon its desire to *punish* the defendant for harming persons who are not before the court," slip op. at 1 (first emphasis added), and that, where circumstances present a risk that the jury may be confused by the purpose for which evidence of other incidents is introduced, "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring," *id.* at 9. At a minimum, this requires vacatur of the judgment below.

At trial of this case involving a particular accident in a Ford Explorer, plaintiffs introduced mountains of evidence regarding other Ford vehicles and alleged injuries, and directly asked the jury to impose punitive damage liability against Ford based on those other vehicles and injuries. The California courts clearly failed to invoke procedures to protect against punishment for third party harm, even though Ford at every turn asked them to do so—by seeking to exclude evidence and argument, asking for a relevant jury instruction, arguing on appeal that this violated due process, and asking the courts to reject unconstitutional consideration of third party harm in their due process excessiveness review.

1. Although this case involved a 1997 Ford Explorer, plaintiffs, from start to finish, devoted much of their case to urging the jury to punish Ford for allegedly killing or injur-

ing third parties not before the court who were driving a different vehicle—the Bronco II. Indeed, in opening statement, plaintiffs' counsel characterized the safety record of the Bronco II—which never injured plaintiffs—as "*issue No. 1, we are going to be dealing with in this case.*" RT 669:11-17 (emphasis added). He added that "the Bronco II has been singled out for criticism" for its "death record." *Id.*

Plaintiffs devoted *days* of testimony to the Bronco II and its supposed failings and then, in closing argument, drove home for the jury their claim that Bronco II injuries themselves warranted imposing punitive damages here:

- "They go ahead and release the Bronco II in 1983 . . . knowing it will roll over and kill or catastrophically injure many people, which it has. Fraud, oppression, malice, these are issues that relate to one question that has clear and convincing [*sic*]. T[his is t]he last question on the verdict form, [and] it is the most importan[t answer] you will give in this case." RT 8172:17-25.

- "Ron Campbell testifies that Ford is aware by 1989 that many people are killed or seriously injured in [Bronco II] rollovers. Right in this time period, and they are going out to market with this new launch with Job 1 with the engineers telling them the same problems. Conscious, deliberate, oppressive, fraudulent conduct." RT 8173:26-8174:3.

See also RT 8172:27-8173:6 (suggesting Ford should be punished here for Bronco II documents allegedly missing for more than 20 years). There was no basis for the jury to think that these arguments were aimed at proving the "reprehensibility" of Ford's conduct in designing the Explorer, as distinguished from punishing Ford directly for harm caused by the Bronco II. *Compare Philip Morris*, slip op. at 7-8. Rather, "the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury," *id.* at 10,

created an "unreasonable and unnecessary risk" that the jury would use its verdict to punish Ford directly for alleged injuries to third parties caused by the Bronco II. *Id.* at 9.[1]

2. Plaintiffs also repeatedly invoked before the jury the alleged accidents and injuries of other Explorer drivers, even though Ford had won the prior eleven cases involving these defect claims, and there was no actual evidence of other injuries, their proximate causes, severity, or how this alleged threat to other drivers compared to that of other SUVs. *Compare Philip Morris*, slip op. at 6 ("[T]o permit punishment for injuring a nonparty victim would add a near-standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate.").[2]

In *Philip Morris*, "the plaintiff's attorney had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In

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[1] The Court in *Philip Morris* emphasized that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" Slip op. at 5 (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). But here not only did the California courts allow plaintiffs to seek punishment based on the fatal rollover rate of the Bronco II—a vehicle not involved in this case—but they barred Ford from introducing evidence that the *Explorer's* own actual rollover rate was much better than the Bronco II's and in fact was "one of the best rollover rates compared to other SUV's in its class." Pet. App. 20a. Consequently, Ford, "threatened with punishment for injuring a nonparty victim[,] ha[d] no opportunity to defend against the charge." *Philip Morris*, slip op. at 6.

[2] Imposing massive punitive damages for a supposed defect after eleven previous juries found no liability at all also risks another due process violation that *Philip Morris* highlights, namely, "the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies . . . upon other States," thereby increasing "the risks of arbitrariness [and] the concern for adequate notice." *Philip Morris*, slip op. at 7.

Oregon, how many people do we see outside, driving home . . . smoking cigarettes?'" Slip op. at 2. In this case, plaintiffs' counsel made an even more extreme closing argument regarding other Explorer owners:

- "[T]housands of these vehicles were manufactured and sold in their defective condition and they are on our highways in California. And every time we look at one of those vehicles, we hope and pray there is no [accident] avoidance maneuver necessary." RT 8508:25-8509:1

- "Hundreds of Explorer rollover cases. [Ford expert] Tandy, involved at least in dozens of on-road untripped Explorer rollover cases. And I cross-examined [Ford expert] Germane, from other cases. . . . Cases that these guys are working on together. Ford management's willingness to accept this risk from the Bronco II through the [1997 model Explorer] is the definition precisely of fraud, malice and oppression." RT 8179:6-14.

- "That was callous, that was willful disregard. Did they do the test? No. The test drivers are out on the roads of California. Willful disregard of the health and safety of Benetta and those like her. Was this a single isolated incident? No. You have heard of others in California. Just a few we were allowed to present." RT 8508:15-21.

- "This is not only . . . a case involving one family here in California, but . . . they marketed to specifically, the soccer moms, the women with babies, the toddler seats, the families." RT 8510:17-20.

3. Ford repeatedly requested that the California courts recognize and apply "the Constitution's procedural limitations," *Philip Morris*, slip op. at 5, precluding punishment based on third party harm. Ford moved *in limine* to exclude the Bronco II evidence, but the trial court denied the motion,

RT 410:9-11, and granted Ford a continuing objection to evidence about the Bronco II. RT 629:5-630:24. Ford also moved the trial court in limine to protect Ford's constitutional due process rights by excluding all evidence or argument for punitive damages based on "conduct that [bears] no relation to the [plaintiffs'] harm," and to

> ensure that plaintiffs do not, in opening or closing statement or at any time during trial, urge punishment on any of these unconstitutional bases. For example, plaintiffs should not be permitted to urge the jury to vindicate the rights of other persons not before the court. . . . or to punish Ford for any conduct that goes beyond the specific alleged harm to the plaintiffs in this case.

Motion In Limine No. 31, at 8-9 (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003)). The court denied Ford's motion in all material respects, excluding only Ford's financial data from the first phase of the bifurcated trial. RT 615:23-616:13.

Ford also proposed to instruct the jury that it could not punish Ford for harms to third parties, but the trial court rejected that instruction. *See* Pet. at 29, Pet. App. 103a (Ford's proposed instruction read: "In determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs. . . . Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit."). Ford moved for a mistrial and an instruction to the jury to disregard plaintiffs' improper arguments on third party harm, but the court refused. *See* RT 8481:26-8482:5, 8497:17-8499:22; 8529:24-8531:8. And Ford asked for new trial, contending it had been unconstitutionally punished for alleged harms of third parties not before the court: "Plaintiffs' punitive damages case consisted principally of improper arguments by counsel, who repeatedly exhorted the

jury to punish Ford for the design of a vehicle that the Buell-Wilsons never owned and that did not cause their injuries. . . . *Counsel's closing argument never ceased invoking the alleged interests and injuries of non-parties*. . . ." Ford's New Trial Motion, at 18-19 (emphasis added).

On appeal, Ford squarely presented the constitutional issue posed by plaintiffs' invocation of third party harm, arguing that plaintiffs' counsel "encouraged the jury to impose punitive damages based on the Bronco II alone" and that

> [a]llowing this irrelevant and inflammatory evidence and argument, particularly to the extent it was allowed here, was highly prejudicial error requiring a new trial. Indeed, plaintiffs' invocation of the Bronco II as a basis for punitive damages, in and of itself, is unconstitutional and grounds for reversal, because *due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court*. *State Farm*, 538 U.S. at 423.

Appellant's Opening Brief at 14-15 (footnotes omitted, emphasis added). Ford specifically argued that a then-recent California Supreme Court decision "confirm[ed] that a defendant may not be punished for conduct that did not harm the plaintiff." *Id.* at 15 n.4 (citing *Johnson* v. *Ford Motor Co.*, 35 Cal. 4th 1191, 1206 n.6 (2005)); *see also id.* at 10 (plaintiffs' "[c]ounsel exhorted the jury to 'send a direct message from society to Ford Motor Company,' . . . not only on behalf of the Wilsons, but to vindicate the interests of other consumers not before the court,'" and appealed to the jury to redress "what has happened to Benetta Wilson, and others like her.'") (citations omitted); Appellant's Reply Brief at 49 ("it is doubly improper to impose punitive damages here based on any alleged conduct in connection with the Bronco II, which never injured plaintiffs"); Petition For Review to the California Supreme Court, at 35-36 (court of ap-

peal's "ruling contradicts *State Farm* . . . because the court punished Ford for conduct toward third parties not before the court and their "hypothetical claims," "without ever proving the specifics of those 'hypothetical claims'") (citation omitted). But the court of appeal rejected all of Ford's constitutional arguments, and itself suggested that Ford could permissibly be punished for injuries resulting from sales of other supposedly defective vehicles, including other Explorers to non-parties, the Bronco II, and even the Pinto, Pet. App. 55a-57a, as respondents have acknowledged. *Id.* at 107a.

4. Here, therefore, as in *Philip Morris*, "the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury," *Philip Morris*, slip op. at 10, created, "an unreasonable and unnecessary risk," *id.* at 9, that the jury acted out of a "desire to punish [Ford] for harming persons who are not before the court." *Id.* at 1. And as this Court concluded in *Philip Morris*, "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 7-8. But the California courts failed to provide such assurance, despite Ford's repeated requests, in plain violation of *Philip Morris*.

CONCLUSION

The Court should grant *certiorari* and set this case for plenary consideration, or, alternatively, grant, vacate, and remand this case for reconsideration in light of *Philip Morris*.

Respectfully submitted.

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